IN THE

Supreme Court of the United States

October Term, 1965.

No. 47.

JAY GIACCIO,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

On Appeal From the Supreme Court of Pennsylvania, Eastern District.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

OPINIONS BELOW.

The majority and dissenting opinions of the Supreme Court of Pennsylvania (R. 47 and R. 56, respectively), are reported at 415 Pa. 139, 202 A. 2d 55 (1964). The majority and dissenting opinions of the Superior Court of Pennsylvania (R. 5 and R. 17, respectively) are reported at 202 Pa. Super. 294, 196 A. 2d 189 (1963). The opinion of the trial court (R. 35) is reported at 30 Pa. D. & C. 2d 463 (Q. S. Chester 1963).

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on July 6, 1964 (R. 47). A Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Pennsylvania on October 2, 1964 (R. 57). On November 24, 1964, the Supreme Court of Pennsylvania granted an extension of time under Rule 13 to docket the appeal and file the Jurisdictional Statement until January 15, 1965 (R. 60-61). The Jurisdictional Statement was filed on January 15, 1965, and probable jurisdiction was noted on May 24, 1965 (R. 62), 381 U. S. 923. The jurisdiction of this Court rests on 28 U. S. C. § 1257(2).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

1. U. S. Constitution, Amendment XIV.

2. Act of March 31, 1860, P. L. 427, § 62; PA. STAT. ANN., tit. 19, § 1222:[1]

> "In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant, shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return of verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

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1. Hereinafter the "Act of 1860."

QUESTIONS PRESENTED.

Appellant was indicted for a misdemeanor and tried before a jury. He was acquitted. As a part of its verdict, however, the jury assessed the costs of prosecution in the amount of $230.95 against him pursuant to the Act of 1860.

The questions presented are substantially those affirmed by the trial court but subsequently rejected by two state appellate courts:

1. Is the Act of 1860 unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution, in that it permits punishment

(a) without any standards prescribed by the statute itself;

(b) on a finding that defendant has been guilty of "some misconduct" or "reprehensible misconduct" which "misconduct" is not otherwise defined or identified at any time, either prior to or during the criminal proceedings?

2. Does the combined effect of the procedural due process violations arising from operation of the Act of 1860 and the mere fact that the Act permits punishment of an innocent person, contrary to every other English speaking jurisdiction where the practice was found to have been considered, violate the fundamental fairness required of all criminal proceedings by the Fourteenth Amendment due process clause?

3. Does the Act of 1860 violate the "equal protection of the laws" embodied in the Fourteenth Amendment because it discriminates against defendants in misdemeanor cases by imposing upon them a burden from which defendants in *both* felony cases and cases involving summary offenses are specifically protected in the absence of any rational basis for making such a distinction?

STATEMENT OF THE CASE.

Appellant was tried in the Court of Quarter Sessions in Chester County, Pennsylvania, on two bills of indictment charging him with unlawfully and wantonly pointing and discharging a firearm at each of two persons. The alleged offenses were misdemeanors and violations of the Act of June 24, 1939, P. L. 872, § 716; PA. STAT. ANN. tit. 18, §4716. The maximum penalty for the indicted offense was a fine not exceeding $500 or imprisonment not exceeding one year or both.

At trial—at which appellant presented his defense *in propria persona*—a verdict of not guilty was directed by the trial court as to one bill (No. 226, September 1961) and the jury placed the costs of prosecution upon the County. As to the second bill (No. 225, September 1961)—in issue here—the jury returned a verdict of not guilty but, pursuant to the Act of 1860, ordered appellant to pay the costs of the prosecution in the amount of $230.95. The court, thereupon, ordered defendant to pay the costs or give security within ten days or stand committed to jail until he complied therewith. Having so posted security, defendant filed a Motion to be Relieved of Payment of Costs on the ground, *inter alia,* that the imposition of costs was contrary to law (R. 33-34).

Defendant initially argued his Motion *in propria persona* on April 27, 1962. While the Court held the matter under advisement, counsel entered their appearance for appellant and filed a Petition for Re-Hearing. The Petition stated, *inter alia,* that "the instant proceedings raise fundamental issues under the United States and Pennsylvania Constitutions which are sufficiently complex to prevent an adequate presentation by the defendant who is not trained in the law." (R. 34-35) A rehearing was granted and counsel thereupon argued the three basic federal constitutional questions which are presented in this appeal. On January 12, 1963, the trial court sustained appellant's

contentions as to all three and held that the Act of 1860, as applied to an acquitted defendant, violated the federal constitution. Appellant's Motion was granted, the verdict "insofar as it imposes upon defendant the penalty of the payment of costs of prosecution" was set aside and the sentence was vacated.

On December 12, 1963, the Superior Court of Pennsylvania reversed the order of the trial court and reinstated the sentence. The majority opinion, written for the court by Judge Robert E. Woodside, held that since the Act had been sustained by the Supreme Court of Pennsylvania in 1875—since the ratification of the Fourteenth Amendment—its federal constitutionality had been conclusively determined. The Court also rejected each of the federal constitutional questions affirmed by the trial court. Judge Gerald F. Flood filed a dissenting opinion which declared that the Act of 1860 was clearly penal in its thrust and violated federal due process.

On appeal to the Supreme Court of Pennsylvania, the order of the Superior Court was affirmed with Mr. Justice Samuel J. Roberts writing the opinion for the four-Justice majority (two Justices did not take part in the consideration of the case). The Court held that because the Act was "civil" rather than "penal" in its application, any consideration of due process protections was academic. However, it went on to discuss and uphold the Act in light of each of appellant's specific constitutional objections. Mr. Justice Herbert B. Cohen filed a dissenting opinion stating that he would adopt the opinion of Judge Flood of the Superior Court.

Having posted the necessary security, defendant is not confined to jail during the pendency of this appeal.

SUMMARY OF THE ARGUMENT.

The Act of 1860 exposes a defendant such as appellant, acquitted of the only offense of which he was charged, to a sentence to pay the costs of prosecution, under threat of automatic imprisonment for failure to pay, without providing any statutory standard whatsoever for defining the conduct being punished. As Pennsylvania courts have construed the Act, the penalty of costs is imposed if the defendant is guilty of "some misconduct", "reprehensible conduct" or "impropriety of conduct." These deficiencies render the Act void for vagueness both on its face and as construed. *Baggett v. Bullitt*, 377 U. S. 360; *Lanzetta v. New Jersey*, 306 U. S. 451.

The simple fact that the Act permits the Commonwealth to condemn and imprison a completely innocent person is sufficient to render it unconstitutional. However, the method by which "guilt" is determined also violates federal due process. Indeed, at each and every step of the judicial process, the defendant is denied his constitutional rights.

First, before a would-be defendant commits any act which may lead to later punishment, he is denied fair warning of what conduct may be against the law. *Lanzetta v. New Jersey, supra; Winters v. New York*, 333 U. S. 507, 524 (Frankfurter J., dissenting).

Once indicted for the original misdemeanor, he still is not charged with a specific infraction for which costs may be assessed, other than, as Pennsylvania courts have said, to be charged with misconduct "related to the indicted offense." Thus unaware of what supposed wrongdoing may be punished, he is denied a reasonable opportunity to defend himself and is deprived of procedural due process. *In re Oliver*, 333 U. S. 251.

When his case comes to trial, a defendant electing to resist the possible assessment of costs is forced to scatter his defense far afield from the original misdemeanor indictment. For example, he may be compelled to offer affirma-

tive evidence of his good character. Under Pennsylvania practice, this permits the prosecution to impeach such evidence by introducing prior criminal convictions. Furthermore, since the prosecution need prove only a *prima facie* case on the original indictment to get to the jury and permit it to assess costs, defendant is denied the constitutional protection that his "misconduct" be proven beyond a reasonable doubt. *Leland v. Oregon,* 343 U. S. 790, 802-03 (Frankfurter, J., dissenting).

The vagueness of the Act also deprives the jury of a standard sufficiently precise to guide it so there will be no unfair discrimination or "ex post facto" treatment in the enforcement of the statute. Without such a standard it is entirely possible—indeed probable—that the jury would use a totally arbitrary, illegal or even unconstitutional standard in assessing costs. *Cox v. Louisiana,* 379 U. S. 536, 552.

After the jury has returned its verdict, defendant is further deprived of an effective opportunity to have the judge set aside the result for abuse of discretion. As with the jury, the judge is entirely without any statutory guide. Neither the judge nor an appellate court on review has any way of knowing why the jury acted as it did. Cf. *Jackson v. Denno,* 378 U. S. 368.

Each one of these defects is sufficient to require the invalidation of the Act of 1860. However, taken cumulatively, they demonstrate beyond all doubt that it violates federal due process.

The Act is also unconstitutional because it discriminates, without any rational basis, against defendants in misdemeanor cases by imposing the possibility of costs assessment against only them. In Pennsylvania, acquitted defendants in *both* felony cases and cases involving summary offenses are protected by specific statutes. This distinction is not based upon constitutionally defensible "degrees of evil", but on a completely arbitrary and unreasonable classification and thus is a denial of equal protection of the laws. *Skinner v. Oklahoma,* 316 U. S. 535.

ARGUMENT.

I. The Act of 1860 Is Void for Vagueness Because It Lacks Any Statutory Criteria Whatsoever for Its Enforcement and Because, as Construed, It Permits the Punishment of Those—Such as Appellant—Who Have Been Adjudged Guilty of No More Than "Impropriety of Conduct", "Reprehensible Conduct" or "Some Misconduct".

A. The Act of 1860 Is a Punitive Measure; It Forcibly Deprives a Defendant of His Property or His Liberty if He Does Not Pay.

The majority opinion of the Supreme Court of Pennsylvania concluded that a discussion of due process protections was academic to this case because the Act of 1860 was "civil" rather than "penal" in character (R. 50).[2] Little light would be shed on this case by appellant making a lengthy argument that the Act of 1860 is indeed "penal." The essential point is simply this: the statute allows the imposition of a penalty upon defendants in criminal cases. As Judge Flood pointed out in his dissenting opinion in the Superior Court (R. 19):

> "No amount of dialectic can alter the fact that this statute provides that an accused may go to jail without having been convicted of any crime—indeed after having been acquitted of the only crime of which he was charged."

2. In reaching this result the Court overruled its own pronouncements dating back as far as 1818. In *Commonwealth v. Tilghman*, 4 S. & R. 127, 129 (Pa. 1818), Mr. Justice Gibson stated, "I grant, that a statute imposing costs, is penal in nature and must be construed strictly . . ." In *Clemens v. Commonwealth*, 7 Watts 485 (Pa. 1838) the Court said, "The statute which enables a grand or petit jury to punish with costs is penal, and to be strictly construed."

The liability imposed under the Act of 1860—commitment to jail—is incurred only in criminal cases and as an adjunct of criminal law enforcement. The liability is only incurred, so Pennsylvania's state courts have said,[3] when defendants are "guilty of misconduct."

This punitive character is conclusively revealed in the following portion of the trial judge's charge in this case as to the application of the Act of 1860 (R. 31):

> "Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been *guilty* of *some misconduct* less than the offense which is charged but nevertheless *misconduct* of some kind as a result of which he should be required *to pay some penalty short of conviction,* the cost of prosecution may be placed upon him if his misconduct has given rise to the prosecution." (Emphasis supplied.)

In substance and effect, the Act of 1860 is similar to the punitive nature of "civil" forfeiture proceedings which have been held by this Court, just last Term, to be criminal insofar as the application of the constitutional exclusionary rule was concerned: *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U. S. 693. See also, *Lowe v. Kansas,* 163 U. S. 81 (requirement that prosecutor pay costs must comply with procedural due process).[4]

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3. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 127 (Pa. 1818); *Commonwealth v. Daly,* 11 Pa. Dist. 527 (Q. S. Clearfield 1902); *Commonwealth v. King,* 33 Pa. D. & C. 2d 235 (Q. S. Allegheny, 1963).

4. Appellee's contention, made in its Motion to Dismiss Appeal for Lack of Jurisdiction, that this Court is bound by the Pennsylvania Supreme Court's determination that the Act of 1860 is "civil" has been frequently rejected and most recently so in *Cox v. Louisiana,* 379 U. S. 536, 559, n. 8:

> "In the area of . . . constitutional protected rights, 'we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."' *Haynes v. Washington,* 373 U. S. 503, 515-516; *Stern v. New York,* 346 U. S. 156, 181."

B. The Act of 1860 Lacks Any Statutory Criteria for Its Enforcement.

A statute imposing liability of this character must contain standards of guilt. The Act of 1860 has none. Without such standards it is void for vagueness. See *Baggett v. Bullitt*, 377 U. S. 360, and cases cited therein; *Lanzetta v. New Jersey*, 306 U. S. 451.

The "void for vagueness" doctrine is a command of due process; it rests on the following principles, both of which are lacking in the Act of 1860:[5] (a) if the state proposes to impose liability for some conduct it must give fair warning to the public by defining, as much as possible, the prohibited conduct;[6] and (b) likewise there must be a standard sufficiently precise to guide the court and jury so that there will not be unfair discrimination or "*ex post facto*" treatment in the enforcement of the statute.[7]

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5. See Note, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 68 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. Q. 195 (1955).

6. Mr. Justice Frankfurter, dissenting in *Winters v. New York*, 333 U. S. 507, 524, stated:

> "Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of 'due process of law.' The legal jargon for such failure to give forewarning is to say that the statute is void for 'indefiniteness.'"

7. Note, Amsterdam, 109 U. OF PA. L. REV. 67 at 93:

> "Many legal responsibilities may be made to turn—as many common-law duties have traditionally turned—upon the 'reasonableness' of conduct as viewed by some trier of fact. But it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation—as also in the realm of more obviously absolute official discretion—that there exists the risk of continuing irregularity with which the vagueness cases have been concerned."

Without such a standard, it is possible that a jury would punish a defendant for a perfectly legal, or, even more serious, a constitutionally protected act. This was the evil at which the holding on vagueness in *Cox v. Louisiana,* 379 U. S. 536, was directed: ". . . that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly."

Indeed, it is perhaps not entirely accidental that two Pennsylvania cases now pending involve areas of possible constitutionally protected activity. In *Commonwealth v. King,* 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), defendant was indicted and charged with the crime of libel in contravention of § 412 of the Act of June 24, 1939, P. L. 872; PA. STAT. ANN., tit. 18, § 4412. Following a verdict of not guilty, the jury assessed costs against defendant pursuant to the Act of 1860. Subsequently, the court rejected defendant's contention that the Act violated the Fourteenth Amendment and held that costs may be assessed against an acquitted defendant when his conduct is "serious and reprehensible." Yet, the act of defendant which the jury sought to punish may very well have been constitutionally protected by the rule of *Garrison v. Louisiana,* 379 U. S. 64, which expressly held that the First Amendment strongly restricts the power of states to impose sanctions for *criminal* libel. Similarly, in *Commonwealth v. Welsh,* Q. S. Bucks Co. Pa., Nov. Term 1962, Nos. 174-175, defendant was assessed costs in the amount of $2,098.59, even though acquitted of an indictment for "macing", in contravention of the Act of April 6, 1939, P. L. 16, § 1; PA. STAT. ANN., tit. 25, § 2374. It is entirely possible that the jury in *Welsh* punished defendant because it was out of sympathy with his particular political activity.

Moreover, if the jury does invade constitutionally protected areas, the absence of a standard also prevents an appellate court from ascertaining what act the jury sought to punish. This effectively negates any chance of proper appellate review.[8]

8. Cf. *Jackson v. Denno,* 378 U. S. 368.

C. The Act of 1860 Unconstitutionally Permits Punishment for "Reprehensible" or "Improper" Conduct or, as in the Charge in This Case, for "Some Misconduct."

A statute invalid under the "void for vagueness" doctrine is unconstitutional either because on its face or as construed by the courts, it offers no standard of conduct that is possible to know: *Winters v. New York*, 333 U. S. 507; *American Seeding Machine Co. v. Kentucky*, 236 U. S. 660; *International Harvester Co. v. Kentucky*, 234 U. S. 216.

The authoritative, long accepted Pennsylvania interpretation of the Act of 1860 comes from a case involving the Act of 1804, 4 Laws of Pa. 204 (Smith 1810), a predecessor which was substantially identical in wording to the Act of 1860.[9] Justice Gibson, in *Commonwealth v. Tilgh-*

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9. The statutory history of the Act of 1860 reveals a picture not of rational legislation, reflecting considered legislative judgment, but, on the contrary, a quixotic, unexplainable law which may have been the result only of legislative accident.

In 1791, in an act entitled "A Supplement to the Penal Laws of this State", the Pennsylvania Assembly declared that (1) in cases of "outlawry"; (2) in all cases in which the grand jury "returned ignoramus" on bills of indictment; and (3) in all cases "where any person shall be brought before a Court . . . on the charge . . . of having committed a crime, and such charge, upon examination, shall appear to be unfounded," the costs should fall on the county. 3 Laws of Pa. 37 (Smith 1810).

Subsequently, in 1797, the Assembly clarified the law: "Whereas, (it declared) . . . a party . . . acquitted [of an indictable offense] is equally liable to costs of prosecution as if he were convicted, *which operates injustice, and a punishment to the innocent* . . . Be it therefore enacted . . . that . . . all costs accruing on all bills . . . charging . . . [any] indictable offense, shall, if such party be acquitted by a petit jury . . . be paid out of the county stock . . . ." 3 Laws of Pa. 281 (Smith 1810). (Emphasis added.)

This enactment plainly demonstrates an original legislative intent in Pennsylvania to avoid what was evident even then, and what should be equally evident now, that the imposition of costs on acquitted defendants is a harsh and unjust practice "as punishment" unfairly imposed on innocent persons. In 1804 the Assembly enacted the following statute, 4 Laws of Pa. 204 (Smith 1810) (which was never

man, supra, **4 S. & R. 126 (Pa. Supreme Ct. 1818) (the first reported appellate case in Pennsylvania to involve the rule**

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signed by the Governor but became law nevertheless because it was returned by him too late to avoid becoming law):

> "WHEREAS experience has proved, that the laws obliging the respective counties to pay the costs of prosecutions, in all criminal cases, where the accused is or are acquitted, have a tendency to promote litigation: inasmuch as they enable restless and turbulent people to harass the peaceable part of the community, with trifling, unfounded, or malicious prosecutions at the expense of the public: Therefore,
>
> "SECT. I. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That from and after the first of November next, in all prosecutions, cases of felony only excepted, if the bill or bills of indictment shall be returned 'ignoramus' the grand jury who returns the same shall decide and certify on such bill, whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals, by the petit jury, on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county or the prosecutor, *or the defendant or defendants,* shall pay the costs of prosecution; and the jury so determining, in case they direct the prosecutor to pay the costs, shall name him or them in their return or verdict. [Emphasis supplied.]
>
> "SECT. II. *And be it further enacted by the authority aforesaid,* That whenever any jury shall determine, as aforesaid, that the prosecutor or prosecutors shall pay the costs, the court in which the said determination shall be made, shall forthwith pass sentence to that effect, and order him, her or them committed to the goal of the county until the costs are paid, unless he, she or they give security to pay the same within ten days."

From the context and expressed purposes of the act, it seems clear that the key to the statute lies with the words "or the prosecutor," and that the legislature was primarily concerned with ill-founded prosecutions and the desirability of relieving the county of *those* costs. See *Commonwealth v. Harkness,* 4 Binn. 194, 195-96 (Pa. Supreme Ct. 1811). In light of this, it seems that the words "or the defendant" (italicized above) were inserted either by mistake or without clear recognition of their ramifications. For the act, read literally, as, of course, it has been, reverted to a practice which only a few years before had been repudiated by the legislature as "unjust" and which was even then constitutionally forbidden by other state constitutions. See, e.g., Fla. CONST. Declarations of Rights § 14; Ga. CONST. art. I,

that an acquitted defendant may be forced to pay costs), explained the rationale of the act and the focal point of its provisions:

> ". . . a defendant, acquitted of actual crime, but *whose conduct may have been reprehensible* in some respects, or whose *innocence may have been doubtful.* . . . ."
>
> "The judgment is not on the indictment, but on something collateral to it. The defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though, on account of something, of *which he was not indicted,* some *impropriety of conduct,* or *ground of suspicion,* which the verdict of the jury has fastened on him. . . ."
>
> "There may, I apprehend, be acts, such as certain kinds of fraud, that are *offensive to morality,* that nevertheless are not indictable. . . ." (Emphasis supplied.)

The *Tilghman* case is still the law of Pennsylvania and its characterization of the Act has been repeated many times.[10] It was also the basis of the Court's charge in this case. See the relevant portion of charge, p. 10, *supra.*

Most recently, the standard was made even less definite by the majority opinion of the Superior Court in this case (R. 15):

> "There are endless situations in which the jury might find that the defendant's improper conduct was responsible for the prosecution even though he was not

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Bill of Rights § 1, para. X; Miss. CONST. art. 14, § 261; N. C. CONST. art. I, Declaration of Rights § 11.

The power of the jury to assess costs against innocent misdemeanor defendants was continued in the same language in the Act of 1860. Presumably the legislature, in enacting this statute, simply swept together all the existing legislation on the subject—without consideration of its merits.

10. *E.g., Baldwin v. Commonwealth,* 26 Pa. 171 (1856); *Commonwealth v. Daly,* 11 Pa. Dist. 527 (Q. S. Clearfield 1902).

> guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fistfight were guilty of conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs; or where the defendant in a 'drunken driving' case drank and then drove while in that twilight zone that exists at some stage of the drinking; or where defendants charged with adultery registered at a hotel as husband and wife but convinced the jury they had not actually committed adultery." [11]

These Pennsylvania cases demonstrate that the statute as construed offers no clear standard of guilt, that it is not "fenced in" sufficiently to give notice of what is to be punished.

In *Baggett v. Bullitt*, 377 U. S. 360, the statute involved required an employee of the State of Washington, as a condition of his employment, to take an oath that he was not a "subversive person." The act was struck down

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11. The harmful effect of Judge Woodside's majority dicta is vividly illustrated by a portion of Judge Flood's dissenting opinion in the Superior Court (R. 20):

> "The statute here condemns no act or omission. The majority points to the common law crimes, punishable under our statutes but defined only by the common law, i.e., decisions of the courts. The precise common law definitions of such crimes, e.g., murder, rape, burglary or arson, could not contrast more sharply than they do with the majority's attempt to define what is punishable here —conduct 'related to the prosecution', 'reprehensible conduct', conduct 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal division of the costs', the conduct in the twilight zone between drunken driving and something less or something reprehensible that does not constitute a crime, such as registering falsely at a hotel as husband and wife."

by this Court which found the oath framed in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." 377 U. S. at 367.

In *Lanzetta v. New Jersey,* 306 U. S. 451, the statute provided for the fine or imprisonment of "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or any other state . . . ." Such person was declared to be a "gangster" and subject to punishment for that reason. After an examination of the meaning of "gang" and "gangster," this Court held the statute invalid. The statute condemned no act or omission; the terms it employed to indicate what it purported to punish were, in the eyes of the Court, so "vague and uncertain" as to be "repugnant" to due process.

The *Baggett* and *Lanzetta* cases did not turn simply on the elusive meaning of the words "subversive person" or "gang." Void for vagueness issues are not problems in semantics. The *Lanzetta* statute was obviously an attempt to authorize the harassment—the punishment of individuals suspected of wrongdoing—suspected of some sort of misconduct which was deliberately or inexcusably left undefined. Justice Frankfurter, speaking of *Lanzetta* (in *Winters v. New York,* 333 U. S. 507, 540, dissenting opinion), identified the rationale of that decision, the vice of vagueness for which the statute was struck down, in the following terms:

> "Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable . . . although not chargeable with any particular offense."

This, then, is the gist of *Lanzetta* and the very same evil at which this Court struck in declaring unconstitutional

the statute involved in *Baggett*. It is the rationale of many similar cases, old and recent, such as *Stoutenburgh v. Frazier*, 16 App. D. C. 229 (D. C. Cir. 1900), and *People v. Alterie*, 356 Ill. 307, 190 N. E. 305 (1934), and the cases cited with approval in *Baggett v. Bullitt, supra*, 377 U. S. at 367. We submit that the Act of 1860 has precisely the same evil.

It might be noted that by invalidating *this* act, this Court need not hold that the legislature may enact no statute imposing costs on acquitted defendants. We might concede, *arguendo*, that situations can be conceived in which it would not be unfair to require acquitted defendants to pay costs. But these situations must be precisely defined; the elements of this punitive liability must be adequately spelled out. The present statute can be used to permit a jury, unrestrained, to punish any sort of conduct or misconduct—or indeed any sort of person—which it may, *ex post facto*, decide should be penalized.

D. If Allowed to Stand, the Majority Opinions Below Will Doubtless Result in an Even Broader Use in the Future of the Punitive Provisions of the Act of 1860.

The impact of the decision here will extend well beyond the present case. In *Commonwealth v. Welsh*, Q. S. Bucks Co. Pa., Nov. Term 1962, Nos. 174-175; p. 12, *supra*, defendant has subsequently filed a Motion In Arrest of Judgment, raising substantially the same federal questions presented in this case. The motion is being held under advisement pending outcome of the instant case.

Commonwealth v. King, 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), p. 12, *supra*, has been appealed to the Superior Court of Pennsylvania; however, upon application by appellant, argument has been deferred pending the outcome of this case.

Although appellant has no definite statistics, he believes that costs are assessed against acquitted defendants in most Pennsylvania counties. However, the number of reported cases is relatively few, apparently because defendants are so relieved at being acquitted of the indicted offense that they would prefer to pay the costs rather than engage in additional litigation.

Unless this Court reverses the order of the Supreme Court of Pennsylvania, the "standards" of "conduct related to the prosecution" and "reprehensible conduct" contained in the Superior Court's majority opinion will find their way into jury charges of future Pennsylvania cases just as "guilty of some misconduct" and "misconduct of some kind" became part of the charge in this case (R. 31). The inescapable result of these dicta, if not reversed, will be a use of the Act of 1860 over a broader factual scale in Pennsylvania in the coming years.

Furthermore, there will be a serious danger that punishment of future defendants will be imposed by the Act of 1860 where the indicted misdemeanors raise delicate distinctions between constitutionally protected acts and the valid exercise of police power. In these areas, the standards must be especially precise. If the protection afforded by a tightly worded misdemeanor statute is completely obviated by the concomitant costs possibility, numerous serious constitutional abuses will occur.

II. The Act's Procedural Unfairness and Its Punishment of Innocent Persons Clearly Deprive Appellant of Due Process of Law.

Due process of law is a guarantee of fundamental fairness. The Act of 1860 falls short of that standard in two ways. It is unconstitutional not only because it sanctions the punishment of innocent persons, but equally because of the method by which it permits "guilt" to be established.

A. The Act of 1860 Is Unfair and Violates Due Process in a Procedural Sense Because:

(1) It is unconstitutionally vague—it is utterly lacking in standards defining the proscribed conduct by which the determination of guilt may be made. (See Point I, *supra.*)

(2) Although it permits the imposition of a punitive sanction, it nevertheless strips the defendant of his right to defend against this punishment by failing to provide him with the requisite notice of the precise misconduct upon which liability is to be founded. *In re Oliver,* 333 U. S. 257.

(3) It fails to provide a hearing *on the issue the jury is to determine.* The only hearing contemplated is the hearing on the crime charged in the indictment.[12] Therefore, since the evidence is limited to that charge, other defense evidence which would be relevant only to the imposition of costs under the Act of 1860 may be barred on the ground that it is not relevant to the indictment. This failure to afford the defendant a reasonable opportunity to defend himself constitutes a denial of due process of law. *In re Oliver, supra.*

(4) It subjects defendant to the probability that his basic defense on the indictment will be prejudiced. For example, to establish his lack of "misconduct", defendant may be compelled to offer affirmative evidence of his good character. Under Pennsylvania practice, this permits the prosecution to impeach by introducing evidence of prior criminal convictions. Thus, defendant is forced to elect. If he defends against the assessment of costs, he is forced to prejudice his defense against the indicted offense.

(5) It relieves the prosecution of the burden of proving those elements which it must prove to establish the

12. For an analysis of these practical procedural aspects, see Judge Flood's opinion (R. 21-22).

requisite "misconduct" beyond a reasonable doubt. It is fundamental that due process in a criminal proceeding includes the right to be deemed innocent until proven guilty beyond a reasonable doubt. *Leland v. Oregon,* 343 U. S. 790, 802-03 (Frankfurter, J., dissenting); *Brinegar v. United States,* 338 U. S. 160, 174 (dictum); *Coffin v. United States,* 156 U. S. 432, 453-56 (dictum). Although the prosecution may have the advantage of reasonable presumptions,[13] nevertheless, the basic burden always remains upon the prosecution.

Each one of these defects, we believe, is sufficient to require the invalidation of the Act of 1860. But when taken cumulatively, they demonstrate beyond all doubt that the statute, as now written and enforced, is so lacking in procedural due process that it is patently unconstitutional.

The foregoing defects make it easily possible that a person entirely innocent of wrongdoing in fact can be punished (and have a court "pass sentence" [14] upon him). Beyond this, the statute by its terms contemplates the imposition of this penalty upon a person who has been acquitted of the only crime with which he has been charged. This in itself is contrary to fundamental fairness.

B. The Act of 1860 Violates Due Process Because It Imposes Punishment (Whether or Not We Characterize It as "Criminal Liability") on Men Who Are Admittedly Innocent in the Eyes of the Law. This Is Abhorrent to the Basic Principles of Justice as Guaranteed by the Fourteenth Amendment.

A determination as to the limits of due process is aided by reference to the law elsewhere: is this practice

13. Compare *Tot v. United States,* 319 U. S. 463 with *Leland v. Oregon,* 343 U. S. 790.

14. Act of 1860, p. 3, *supra.*

followed, or, conversely, condemned, in jurisdictions which share the same basic concepts of criminal justice? See *Leland v. Oregon*, 343 U. S. 790, 798;[15] *Rochin v. California*, 342 U. S. 165; *Adamson v. California*, 332 U. S. 46.

At common law—in England in the 17th and 18th centuries—costs lay where they fell. Innocent defendants were never required to pay their prosecutors' costs. See, Archbold, *Pleading and Evidence in Criminal Cases* 161 (1834 ed.); 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); Note, *Criminal Costs Assessment in Missouri—Without Rhyme or Reason*, 1962 WASH. U. L. Q. 76-77. In England today, not only are costs not imposed upon acquitted defendants, but *precisely the opposite*, there is provision for the award of expenses properly incurred in carrying on their defense. Costs in Criminal Cases Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 48 (1952). See Note, 1962 WASH. U. L. Q. 76, 77-78.[16]

The federal procedure permits costs to be taxed only in the case of a conviction: 28 U. S. C. § 1918 (1958). Also, several states have statutory provisions on the subject (full texts of which are attached hereto as Appendix B), all of which protect acquitted defendants from the imposition of

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15. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934)." *Leland v. Oregon, supra* at 798.

16. In discussing equality in the administration of criminal justice in the Fifth Annual James Madison Lecture on February 11, 1964, former Mr. Justice Goldberg said (39 N. Y. U. L. Rev. 205, 223-4):

> ". . . [W]e can learn much from the Scandinavian countries * * * If the accused is acquitted no effort is made to collect the cost of defense regardless of the defendant's means. * * *.
>
> . . . [W]e should certainly consider adopting procedures whereby persons erroneously charged with crime could be reimbursed for their expenditures in defending against the charge."

costs. The Act of 1860 reflects a practice which has been condemned in other states. See, *e.g., Arnold v. State,* 76 Wyo. 445, 306 P. 2d 368 (1957); *Childers v. Commonwealth,* 171 Va. 456, 198 S. E. 487 (1938); *State v. Brooks,* 33 Kan. 708, 7 Pac. 591 (1885); *Biester v. State,* 65 Neb. 276, 91 N. W. 416 (1902). Although none of these cases specifically involved a statute or order imposing costs on an acquitted defendant—for, we believe, in no state has the practice ever been authorized—nevertheless, in each case the court, by the way of dicta, indicated that costs should never be so imposed. As indicated, Note 9, *supra,* the practice is constitutionally forbidden in at least four states.

We believe no other jurisdiction imposes costs on acquitted defendants. Our research—portions of which is indicated above and in Appendix B—reveals no authority for the practice: see, *e.g.,* 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); 14 Am. Jur., *Costs* § 107 (1938); 20 C. J. S., *Costs* § 437 (1940). All of the authorities found either prevented or condemned the practice.

It is said, however, that in Pennsylvania "at common law" the defendant bore the costs of a prosecution. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 126, 127 (Pa. Supreme Ct. 1818); Kessler, *Criminal Procedure in Pennsylvania* 235 (1961). Beyond Justice Gibson's statement in *Tilghman, supra,* upon which later dicta seem to rely, we have found no case decided prior to the enactment of statutes dealing with the subject which demonstrate the common law practice in Pennsylvania. The history in Pennsylvania indicates that its adoption may even have been accidental; in any event, the history hardly supports the idea that the practice was carefully judged as fair.[17]

17. For a history of the Act, see Note 9, *supra.*

III. The Act of 1860 Singles Out Defendants Acquitted of a Misdemeanor by a Jury and Fastens a Peculiar Liability Upon Them—Yet Other Pennsylvania Costs Statutes Specifically Protect Defendants Acquitted of Both Felonies and Summary Offenses From Similar Penalties; Such Is a Denial of the "Equal Protection of the Laws" Guaranteed by the Fourteenth Amendment.

The Act of 1860 permits a jury to assess costs upon a defendant acquitted of the commission of a misdemeanor. The Act of Sept. 23, 1791, § 13; 3 Laws of Pa. 37 (Smith 1810); PA. STAT. ANN. tit. 19, § 1221, as construed, directs that no costs shall be imposed on a defendant found innocent in a summary proceeding. The Act of March 31, 1860, P. L. 427, § 64; PA. STAT. ANN. tit. 19, § 1223, which derives from the Act of 1797, 3 Laws of Pa. 281 (Smith 1810) wherein it had been declared that the imposition of *any* costs on an acquitted defendant was "unjust", deals with felonies and provides that costs shall not be imposed on a defendant found innocent of a felony charge.

The distinction between the "improper conduct" which leads to an indictment for a misdemeanor and which, under the Act of 1860, permits the imposition of punishment, i.e., costs, and the "improper conduct" which leads to an indictment for a felony or a summary offense and which, under 1221 or 1223, is not punishable by the imposition of costs in the event of an acquittal, is simply not rational. Such distinction is not the result of the application of a reasonable standard.

The peculiar penalty for "improper conduct" which is sanctioned by the Act of 1860 is not, vis-à-vis PA. STAT. ANN. tit. 19, § 1221 and § 1223, justified by practical exigencies nor by the dictates of experience. This is not a matter of "degrees of evil" which were held constitutional in *Truax v. Raich,* 239 U. S. 33. This penalty is the product of historical accident and only serves to impose upon a person

acquitted of a particular arbitrary category of offense a liability to punishment from which a person charged with a more serious offense or a less serious offense has been expressly immunized. Such is an unreasonable classification, a denial of the equal protection of the laws and is, therefore, unconstitutional. *Skinner v. Oklahoma,* 316 U. S. 535.

CONCLUSION.

For the reasons stated above, this Court should reverse the judgment and order of the Supreme Court of Pennsylvania and hold that the Act of 1860 is unconstitutional as applied to acquitted defendants.

Respectfully submitted,

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September 10, 1965.

APPENDIX "A".

PORTION OF CHARGE OF THE COURT DEALING WITH COSTS.

GAWTHROP, *P. J.:*

If, but only if, you find not guilty verdicts, members of the jury, do you dispose of the costs of prosecution. Now, with regard to the Bill No. 226, where I have directed that you find a verdict of not guilty, you will have to dispose of the costs of prosecution. Whatever you may determine as to the other bill of indictment, if you find the defendant not guilty on the Bill No. 225, that is, the one involving the incident with the Bauman boy, then and only then will you consider the costs of prosecution on that bill.

Costs of prosecution may be disposed of in three ways where misdemeanor charges are found unproved by a jury. The charge made in each of these bills of indictment, as to all counts, is a misdemeanor charge. In felony cases, that is, more serious offenses such as rape, robbery, burglary and so forth, the jury has nothing to do with disposing of the costs in case of an acquittal. In misdemeanor cases it is the jury's duty to dispose of costs if it finds not guilty verdicts. If you find the defendant not guilty on any bill of indictment you must dispose of the costs of prosecution in one of three ways. They may be placed either upon the defendant or upon the prosecutor, or upon the county. Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction, the costs of prosecution may be placed upon him if his misconduct has given rise to the prosecution. If you find the defendant not

guilty and find that he should not pay the costs as defendant, you may consider whether or not you will put the costs of prosecution on the prosecutor.

Now, in the bill of indictment involving the incident with Mrs. Arters, Evelyn A. Arters is endorsed as the prosecutrix on the bill of indictment. In the bill charging the affair involving the Bauman boy, Elizabeth J. Fuhrman is endorsed on the bill as the prosecutrix. You may find that those persons are or are not the actual prosecutors, as the evidence may indicate to you, in either or both of the bills, if you find that someone else actually is the prosecutor. In any event, if you find the defendant not guilty on either of these bills,-or both, as to any not guilty verdict, you may consider placing the costs of prosecution on the prosecutor if you decide the defendant should not pay them, if you find that the prosecution, instead of being brought in good faith for the reasons set forth in the charge, was on the contrary brought out of malice or some ill-will, or other improper motive; and if you find that neither the defendant nor the prosecutor should pay the costs of prosecution, in case of a not guilty verdict, then you may place the costs in the only other place where they may go, and that is on the County of Chester.

I repeat, you do not come to the question of disposing of the costs unless and until you find a verdict of not guilty. Now, under these rather strange circumstances, you will have to dispose of the costs of prosecution on Bill No. 226 in any event because I have directed that you return a verdict of not guilty on that bill. As to Bill No. 225, involving the Bauman boy, you won't reach that question of costs unless and until you first find the defendant not guilty. If you do find him not guilty on that bill, then you will consider the costs of prosecution.

(Remaining portion of Charge of Court not transcribed.)

(The Jury retired but returned for further instructions as follows:)

THE COURT: Members of the jury, you have asked this question of the Court in writing: "If a verdict of innocence is arrived at may we then divide the costs of prosecution between the defendant and the prosecutor? If so, may we decide how the costs should be divided?"

I will answer those questions in the order in which you have asked them. If you find a verdict of not guilty on either or both bills of indictment, and you will recall that we have directed you to find a not guilty verdict on one of the bills involving Mrs. Arters' matter, if you find a verdict of not guilty on any bill of indictment the costs on that bill of indictment may be divided between the defendant and the prosecutor, naming the prosecutor—and that is important if your verdict is to be effective—in such proportion as you determine to be appropriate. Our Act of Assembly provides that that may be done.

That answers, I think, both of your questions. In other words, first, you may, in case of a not guilty verdict, divide the costs between the prosecutor and the defendant, on that or any such bill of indictment. And in so doing you must name the prosecutor to make your verdict effective in that respect. You may divide the costs between the defendant and the prosecutor in such proportion as to you seems proper under the circumstances.

Does that answer your question?

FORELADY: Yes.

THE COURT: Very well. Will you please retire to your jury room and determine upon your verdict, having in mind that if in the bill of indictment involving the boy Donald Bauman you arrive at a not guilty verdict, you will therefore, on both bills of indictment, have to dispose of the costs of prosecution in accordance with the instructions I have given you.

Will you please return to your jury room.

(End of Charge on costs.)

APPENDIX "B".

AUTHORITIES FROM OTHER JURISDICTIONS.

COL. REV. STAT. § 32-2-1 (1953):

"The costs in criminal cases shall be paid by the county in which the offense was committed, when the defendant shall be convicted and shall be unable to pay them; when the defendant is acquitted the costs shall be paid by the county in which the offense was committed, unless the prosecuting witness be adjudged to pay them. . . ."

CONN. GEN. STAT. ANN. § 54-143 (1958):

"The costs of prosecution shall not be imposed against any person convicted of crime . . ."

DEL. CONSTIT. ART. XV, § 3:

"No costs shall be paid by a person accused, on a bill returned ignoramus, nor on acquittal."

FLA. STAT. ANN. § 939.06 (1941):

"No defendant in a criminal prosecution who is acquitted or discharged shall be liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody . . ."

ILL. REV. STAT. Ch. 38, § 180-3 (1963):

"When any person is *convicted* of an offense under any statute, or at common law, the court shall give judgment that the offender pay the costs of the prosecution. (Emphasis added.)

See *Heist v. People*, 56 Ill. App. 391 (1895) holding that an acquitted defendant is absolved from payment of all costs.

IND. STAT. ANN. § 9-1826 (1956):

"When a defendant is acquitted in a criminal action he shall not be liable for any costs . . ."

See *Smith v. State,* 5 Ind. 541 (1854) holding that when, by a judgment of the Supreme Court, a defendant is finally acquitted, no costs are taxed to him.

IOWA CODE ANN. § 337.12 (1953):

"In all criminal cases where the prosecution fails . . . the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury . . ."

LA. REV. STAT. ANN. § 15-529.9 (1950):

"Every judgment of conviction shall subject the person convicted to the payment of all costs of the prosecution whether so stated in the sentence or not. In no case shall any person be subject to the payment of costs in any criminal prosecution when acquitted by the court or jury."

MASS. ANN. LAWS ch. 278, § 14 (1956):

"No prisoner or person under recognizance, acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees or for any charge for subsistence while he was in custody."

MD. CODE ANN., art. 24, § 7 (1957):

"No person who may be prosecuted for any misdemeanor or offense and discharged by the court on submission, or fined not exceeding fifteen cents, or prosecuted for any crime and acquitted on trial by jury, shall be burdened with the payment of any costs or fees accruing on such prosecution, but all such costs and fees, *with the legal costs of the party accused,* shall be paid by the county. . . ." (Emphasis added.)

MICH. STAT. ANN. tit. 28, § 28.1057 (1948):

"No prisoner or person under cognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office, or for any charge of subsistence while he was in custody."

MISSISSIPPI CONSTIT. ART. 14, § 261:

"The expenses of criminal prosecutions . . . shall be borne by the county in which such prosecutions shall be begun . . . . Defendants, *in cases of convictions,* may be taxed with the costs." (Emphasis added.)

MISSOURI STAT. ANN., tit. 37, § 550.040 (1959):

"In all capital cases, and those in which imprisonment in the penetentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

N. H. REV. STAT. ANN. § 618:14 (1955):

"The assessment of any costs against respondents in criminal cases is hereby forbidden and all laws whether or not specifically designated hereinafter are hereby repealed insofar as they assess costs against respondents in criminal cases . . ."

N. J. S. A. § 22A:3-2 (1964):

". . . No costs shall be charged against the defendant where indictment is quashed, the defendant is acquitted or the judgment is arrested."

N. Y. Code of Criminal Procedure § 719:

"When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged; and if the court certify, upon its minutes, or the jury find that the prosecution was malicious or without probable cause, the court must order the prosecutor to pay the costs of the proceedings. . . ."

N. C. Gen. Stats. § 6-49 (1951):

"In all criminal actions in any court, if the defendant is acquitted, *nolle prosequi* entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses . . . shall be paid by the prosecutor . . ."

Okla. Stat. Ann. § 101 (1951):

"The fees herein provided for . . . and all costs in the prosecution of all criminal actions shall *in case of conviction of* the defendant be adjudged *a part of the penalty of the offense of which the defendant may be convicted* . . ." (Emphasis added.)

Tenn. Code Ann. § 40-3332 (1956):

"The state, or the county in which the offense was committed or is triable, according to the nature of the offense, pays the costs accrued on behalf of the state, and for which the state or county is liable . . . in the following cases:

(1) When the defendant is acquitted by a verdict of the jury upon the merits.

(2) When the prosecution is dismissed, or a nolle prosequi entered by the state.

(3) When the action has abated by the death of the defendant.

(4) When the defendant is discharged by the court or magistrate before indictment preferred or found, or after indictment and before verdict.

(5) When the defendant has been convicted, but the execution issued upon the judgment has been returned 'nulla bona'."

TEXAS CODE OF CRIM. PROC., Art. 1018 (1950):

"When the defendant is *convicted,* the costs and fees paid by the State under this title shall be a charge against him, except when sentenced to death or to imprisonment for life. . . ." (Emphasis added.)

WASH. REV. CODE ANN. tit. 10, § 10.46.200 (1881):

"No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or for want of prosecution, shall be liable for any costs or fees of any officer or for any charge of subsistence while he is in custody . . ."

WISC. STAT. ANN. § 959.055 (1958):

". . . when the defendant is acquitted the county shall pay the costs . . ."

WYO. STAT. § 7-179 (1957):

". . . In all misdemeanor cases, where the defendant is acquitted, the court or jury, before whom the case is tried, may assess the costs against the prosecuting witness or the costs of said action may be assessed against the county, but in all cases where the prosecuting attorney files the complaint, in his own name, the county shall pay the costs if the defendant be acquitted."

APPENDIX "C".

ORDERS, JUDGMENTS AND DECREES APPEALED FROM.

ORDER OF TRIAL COURT:

"Defendant's motion to be relieved of the costs of prosecution is granted. The verdict, insofar as it imposes upon defendant the penalty of the payment of costs of prosecution, is set aside as being contrary to law. The sentence imposed upon defendant that he pay said costs forthwith or give security to pay the same within ten days and to stand committed until he had complied therewith is vacated." (January 12, 1963)

ORDER OF SUPERIOR COURT OF PENNSYLVANIA:

"Order reversed, sentence reinstated." (December 12, 1963)

ORDER OF SUPREME COURT OF PENNSYLVANIA:

"The order of the Superior Court is affirmed." (July 6, 1964)